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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ISAAK AYZENSHTEYN,

Plaintiff and Appellant,

v.

REXAM BEVERAGE CAN COMPANY
et al.,

Defendants and Respondents.

B196458

(Los Angeles County
Super. Ct. No. BC343965)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Joanne B. O'Donnell, Judge. Reversed with directions.

Law Offices of Joseph M. Lovretovich, Joseph M. Lovretovich, Nicholas W.
Sarris, and Roger E. Haag for Plaintiff and Appellant.

Littler Mendelson, Barrett K. Green and Dina K. Cohen for Defendants and
Respondents.

Plaintiff, Isaak Ayzenshteyn, appeals from summary judgment for defendants, Rexam Beverage Can Company (Rexam) and its supervisors Gregory Rome and Robert Riggs, in an action for employment discrimination. Plaintiff seeks reversal and reinstatement of causes of action for disability discrimination, failure to make reasonable accommodation for disability, failure to engage in interactive process, wrongful constructive termination, and retaliation, all grounded in the California Fair Employment and Housing Act, Government Code section 12900 et seq. (FEHA; undesignated section references are to the Government Code), as well as a claim for unlawful business practices (Bus. & Prof. Code § 17200), and for punitive damages.¹ Of these, only the retaliation and unfair practices claims were alleged against the individual defendants as well as Rexam.

We conclude that the trial court erred in summarily adjudicating these claims, except for the retaliation cause of action and the punitive damages claims. We reverse and remand for entry of a corresponding order.

FACTS

The following basic facts were undisputed. Rexam is a manufacturer of soft drink beverage cans, with a factory in Chatsworth. Before 2000, the facility was owned and operated by another can manufacturer (ANC), which employed plaintiff. Plaintiff's employment continued under Rexam, in the position of production supervisor. In 2003, Rexam installed defendants Riggs and Rome respectively as plant manager and production manager, Rome becoming plaintiff's supervisor. In 2004, plaintiff and others of his rank were placed on a "production improvement plan." Plaintiff completed this program successfully.

Under both employers, plaintiff was required as a supervisor to traverse the factory floor extensively. At Rexam, plaintiff's work schedule ranged as high as 13

¹ Plaintiff also states that he seeks reinstatement of his cause of action for failure to prevent discrimination. But other than so stating, plaintiff does not mention or discuss this claim. We therefore consider it abandoned. (See, e.g., *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

hours per day, for 11 consecutive days. Plaintiff had previously suffered from a condition known as hammertoe, which causes the toes to bend upward. In October 1996, plaintiff had surgery to relieve the condition, by removing the joints from his toes, except the big toes. A physician termed plaintiff disabled for three months, because of the “extensive surgery.” According to plaintiff, he thereafter found it painful to walk long distances.² After plaintiff returned to work, ANC rented a scooter for him to use to traverse the plant. Several years later, ANC bought a replacement scooter for plaintiff’s use.

Plaintiff continued to use the scooter under Rexam, until it was damaged by a forklift, in late 2004. While plaintiff was on vacation, Riggs had the damaged scooter disposed of. Despite plaintiff’s requests, Rexam did not replace the scooter, and instead required plaintiff to work (and walk) without it. He did so for about six months, and then retired, in August 2005. Rexam’s failure to replace the scooter formed the primary basis of plaintiff’s present causes of action, for disability discrimination (§ 12940, subd. (a)), failure to make reasonable accommodation (*id.*, subd. (m)), failure to interact to that end (*id.*, subd. (n)), constructive termination (*id.*, subd. (a)), retaliation (*id.* subd. (h)), and unlawful business practices (Bus. & Prof. Code, § 17200). (Plaintiff also asserted several other causes of action, which he has presently abandoned.)

Defendants’ motion for summary judgment alternatively sought summary adjudication of numerous issues. Defendants relied on portions of plaintiff’s deposition, declarations by the individual defendants, and exhibits. Plaintiff opposed the motion based on further excerpts of his deposition, as well as portions of the individual defendants’ depositions, and plaintiff’s own declaration.

After sustaining various objections to plaintiff’s declaration and certain deposition content, the trial court granted summary judgment. In a 13-page minute order, the court

² Except for a website description of hammertoe and the physician’s note, all information concerning plaintiff’s alleged disability and its background came from plaintiff’s testimony.

set forth its reasoning with respect to each cause of action and the punitive damages claims. The court later denied plaintiff's motion for new trial.

DISCUSSION

We review the grant of summary judgment de novo. (*Merrill v. Navagar, Inc.* (2001) 26 Cal.4th 465, 476; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*.) In so doing, we follow the rules set forth in Code of Civil Procedure section 437c, as explicated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*). To obtain summary judgment, defendants had to show either that one or more elements of plaintiff's claims could not be established, or that there existed a complete affirmative defense to those claims. (Code Civ. Proc., § 437c, subds. (a), (o)(1), (o)(2), (p)(2).) Defendants could do this by advancing evidence that either negated the claim or element, showed that plaintiff had insufficient evidence to establish it, or established the complete defense. (*Ibid.*) Defendants bore the burden of persuading the court to this effect. (*Aguilar*, at p. 850.)

Defendants also had the initial burden of producing evidence sufficient to make a prima facie showing, i.e., one that would require a trier of fact to find in their favor, more likely than not, on the issue in question. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851.) If they did, the burden shifted to plaintiff, to produce evidence establishing a triable issue of material fact, i.e., a prima facie case that would support a jury finding in plaintiff's favor under the applicable burden of proof. (*Ibid.*) In determining whether these burdens were met, we view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing his evidence while strictly scrutinizing defendant's. (*Id.* at p. 856; *Saelzler, supra*, 25 Cal.4th at p. 768.)

1. Disability.

A principal ground for the trial court's disapproval of plaintiff's disability discrimination cause of action, and also certain other causes that included plaintiff's disability as an element, was that plaintiff failed to establish a triable issue that he suffered from a disability. That ruling was erroneous.

For purposes of unfair practices under FEHA, “physical disability” is defined by section 12926, subdivision (k), as including having a disease, disorder, condition or anatomical loss that affects the musculoskeletal system, and limits a major life activity by making its achievement difficult. Plaintiff made a prima facie case of such a disability, by his testimony that since the 1996 removal of his toe joints, he found it difficult and painful to walk for long durations or distances.

The trial court ruled, however, that plaintiff had not made the requisite showing, because (1) he admitted not having seen a doctor about his feet since the surgery; (2) he presented no evidence that he experienced greater pain than did others in his position, or (3) that the pain was the result of the surgery; and (4) he presented no competent medical evidence that he had a condition. These facts did not negative plaintiff’s testimony or his showing of disability. At best, items 1, 2, and 4 were opposing, circumstantial evidence, for trial. And plaintiff’s testimony provided sufficient evidence for an inference that his pain stemmed from the removal of his toe joints. Plaintiff made a prima facie showing that he suffered from the disability he claimed.

2. Employer Knowledge.

The trial court next ruled it undisputed that Rexam did not know of plaintiff’s disability, such knowledge being necessary to a cause of action for disability discrimination. (See § 12940, subd. (a).) The court stated, “Even assuming Plaintiff were disabled within the meaning of the FEHA, the competent admissible evidence presented indicates that Rexam did not know of it.”

This ruling also was erroneous. In a portion of his declaration to which objections were overruled, plaintiff testified that defendants Riggs and Rome, and also Rexam human resources manager Worden, had asked him why he used a scooter, and “I informed them and others that I had received an operation that made it difficult and tiring to walk long distances.” In his deposition testimony, plaintiff further explained how he had described his disability and consequent use of the scooter to these individuals. Rome also addressed these discussions in his deposition.

In its order, the court took note of this testimony, but mischaracterized it.³ The court also observed that (1) plaintiff never presented his disability or its restrictions to Rexam in writing, or with medical documentation; and (2) he worked over six months without the scooter, did not miss any of those days because of foot problems, and didn't then tell Rexam he couldn't do the job without the scooter or other accommodation. Whether or not relevant to the question of Rexam's knowledge, these facts do not refute plaintiff's evidence that he made defendants aware of his disability. The issue of employer knowledge was triable.

3. Adverse Employment Action.

The elements of disability and knowledge were the only grounds the trial court relied on in summarily adjudicating plaintiff's disability discrimination cause of action. Defendants, however, assert a further one. They contend that the failure to replace plaintiff's scooter did not constitute an "adverse employment action," so as to complete a claim of discrimination. Rather, defendants argue, the refusal to restore the scooter at worst constituted a failure to accommodate plaintiff's disability, under section 12940, subdivision (m), which is an independent wrong.

We disagree. The element of adverse action to which defendants refer is stated in section 12940, subdivision (a), which makes it unlawful, inter alia, to discriminate on the basis of disability with respect to "terms, conditions, or privileges of employment." The adverse action to which plaintiff testified included not replacing his damaged scooter, and requiring him to perform his job on foot, not only for about 13 hours a day but in a least one instance for 11 straight days. This constituted a substantial change in the conditions of plaintiff's employment, or at least showed a triable issue of one. In sum, it was error to summarily adjudicate plaintiff's disability discrimination claim.

³ The court stated: "None of the testimony presented by plaintiff, however, indicates that he told them that he required the scooter in order to be able to accomplish his job tasks or to accommodate a disability." But both plaintiff and Rome testified that plaintiff had said essentially this, in simpler, non-legal terms.

4. *Constructive Discharge.*

The trial court held inadequate as a matter of law plaintiff's showing of constructive discharge, on which plaintiff grounded two effectively identical causes of action, one for discharge because of disability (§ 12940, subd. (a)) and the other for discharge in violation of public policy, derived from the FEHA.

Constructive discharge requires that the employee be subjected to intolerable working conditions, which not only compel him or her to resign, but also are so intolerable that a reasonable person in the employee's position would feel so compelled. (E.g., *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 902, citing *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238.) Plaintiff originally contended that his actionable working conditions comprised both the elimination of his scooter and certain independent, allegedly harassing conduct by defendants, but he presently defends the constructive discharge causes of action only on the basis of the scooter displacement and the consequent working conditions.

The trial court ruled that none of plaintiff's grounds "r[ise] to the level of constructive discharge." The question on review is whether plaintiff's on-the-job situation and treatment in 2005, without the scooter, presented a triable issue of the degree of adversity that would have led a reasonable person in plaintiff's position – and did cause plaintiff – to resign.

Plaintiff's deposition contains the following evidence relevant to this determination. Plaintiff testified that when he began working without the scooter in early 2005, he found it hard to work walking for 12 hours, or one day, not to mention the 11 unbroken days Rome assigned him. Plaintiff told Rome of this problem, and Rome told plaintiff that if he missed work he would be disciplined. After about a month, plaintiff approached Rome again and said it was hard for him to walk, and he needed a scooter. Rome replied that he saw no problem with plaintiff walking, and plaintiff referred to the removal of his joints, which he said was permanent. Plaintiff had previously spoken with Riggs and Worden about his need for the scooter, in 2003 and 2004. Referring to his

decision to retire in August 2005, plaintiff testified that he was on vacation in July, and “between January and July it was as much time as I could handle it walking without a scooter and harassment inside the plant, and it was the end of it.”

The foregoing evidence reflects that plaintiff underwent painfully altered working conditions during his last six months of a long employment, as the result of Rexam’s conduct and inaction. He ultimately felt compelled to leave. Although plaintiff worked without a scooter for six months before leaving, that does not foreclose his claim of intolerable working conditions. (Chin et al., Cal. Practice Guide: Employment Litigation (Rutter 2008) ¶ 4:440, p. 4-51.) We believe that plaintiff’s showing amounted to a prima facie case of constructive discharge, so that summary adjudication was inappropriate.

5. Accommodation.

Plaintiff asserted causes of action under subdivisions (m) and (n) of section 12940, which respectively prohibit an employer from (1) failing to make reasonable accommodation for an employee’s known disability, and (2) failing “to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability” Plaintiff’s claims were based on Rexam’s discontinuing the longstanding accommodation of the scooter, and failure to engage in discussions with plaintiff about his request that the accommodation again be provided.

The trial court rejected these causes of action on grounds that (1) plaintiff could not show a disability; and (2) in any event Rexam did not know he was claiming one, in part because plaintiff provided “no doctor’s note,” and worked for six months without the scooter. We have already found these premises incorrect. The court also stated that Rexam had unrebuttedly claimed it did not understand plaintiff’s request for the scooter as being for an accommodation, as opposed to a convenience. Defendants present no authority, however, that such a unilateral misunderstanding excuses an employer’s failures to accommodate and interact. And even if it could, plaintiff’s evidence of his

requests for restoration of the scooter at least established a triable issue whether Rexam could and genuinely did misconstrue them. The accommodation and interaction causes of action should not have been summarily adjudicated.

6. Retaliation.

Plaintiff asserted a purported cause of action for retaliation, under section 12940, subdivision (h). That subdivision prohibits discharge or other discrimination against a person because he or she “has opposed any practices forbidden under [FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA].” Plaintiff’s theory was that he suffered adverse working conditions, and was constructively discharged, in retaliation for requesting the accommodation of replacement of his scooter.

The trial court rejected this cause of action on grounds plaintiff had not shown either a disability or Rexam’s knowledge of one. As before, these reasons were intrinsically incorrect. Nevertheless, the claim was properly subject to dismissal, because it was both redundant of other causes of action plaintiff asserted, and lacked necessary elements of a retaliation cause.

The elements of a retaliation claim under FEHA are that (1) the plaintiff “engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

The theory of plaintiff’s retaliation claim was that because of plaintiff’s request for accommodation by way of a replacement scooter, defendants subjected him to the adverse condition of having to work without one, and also constructively discharged him. These allegations duplicate and are redundant of the allegations of plaintiff’s causes of action for failure to accommodate and constructive discharge. Furthermore, they do not state the elements of a retaliation claim. It is doubtful that requesting an accommodation constitutes “oppos[ing] [a] practic[e] forbidden under [FEHA]” (§ 12940, subd. (h)), for

which “protected activity” is shorthand. (See *Yanowitz, supra*, 36 Cal.4th at p. 1047.) For these reasons, dismissal of plaintiff’s retaliation claim cannot be considered prejudicial error.

7. Unlawful Business Practices

Plaintiff alleged a final cause of action for restitution under Business and Professions Code section 17200 et seq., relying on various of the alleged FEHA violations as unlawful business practices. A claim under Business and Professions Code section 17200 may be based on violations of FEHA. (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 400-401.) The trial court dismissed this cause because all of plaintiff’s FEHA claims had been adjudicated as without merit. Defendants defend the ruling on that basis, but it no longer applies. We have determined that at least some of the violations plaintiff relied upon were triable. Because defendants did not satisfy their burden for summary adjudication of this cause of action, it must be reinstated.

8. Punitive Damages.

Each of plaintiff’s present FEHA causes included a claim for punitive damages, based on malice or oppression. With respect to Rexam, the trial court summarily adjudicated these claims on grounds there was no evidence of participation in the challenged acts by a managing agent of the corporation. (Civ. Code, § 3294, subd. (b).) In particular, the court ruled, it was undisputed that neither plaintiff’s supervisor Rome, or Rome’s supervisor Riggs, was an officer, director, or managing agent.

This disposition was sound. In support of defendants’ challenge to the punitive damages claims, Riggs, the former plant manager, declared that although responsible for all plant operations, he had no authority to establish or change business policy, “because such authority rested in Rexam’s corporate headquarters.” The same was true, Riggs stated, of his subordinate Rome. In response to this prima facie showing, plaintiff asserted in his points and authorities that Rome’s deposition showed “that he asserts some control over the business direction of Rexam.” But plaintiff provided no citation to the record for this statement, and the pages of Rome’s deposition that plaintiff cited in his

separate statement are not found in the record. Rexam's showing thus was unrebutted, and it justified summary adjudication of plaintiff's punitive damages claims against Rexam. (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421-422.)⁴

DISPOSITION

The judgment is reversed, with directions to deny defendants' motion for summary judgment or summary adjudication with respect to the first, second, sixth, ninth, tenth, and fifteenth causes of action of the complaint, and to summarily adjudicate the remaining causes of action and the claims for punitive damages to be without merit. Plaintiff shall recover costs.

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COOPER, P. J.

We concur:

FLIER, J.

BIGELOW, J.

⁴ Only two causes of action before us were asserted against Riggs and Rome personally. The only one that sought punitive damages, the retaliation claim, has been determined to lack merit. Accordingly, no issue remains concerning punitive damages against the individual defendants.